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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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IN THE MATTER OF:

DOCKET NO. S-3177-I

**FOREX INVESTMENT SERVICES
CORPORATION**
2700 North Central Avenue, Suite 1110
Phoenix, Arizona 85004

**RESPONDENTS' POST-HEARING
MEMORANDUM**

et al.,

Respondents.

Respondents¹ submit their Post-Hearing Memorandum.² The Arizona Corporation Commission ("Commission") should dismiss all allegations set forth in the Notice of Opportunity for Hearing against Respondents.

I. Introduction.

Despite the State's contentions, this case does not involve an international conspiracy. These proceedings are the result of the actions of one person; James Simmons, a rogue salesman of FISC. Mr. Simmons took advantage of personal relationships he had with several individuals; provided false information to them; misrepresented his credentials and induced them to invest in FISC. Only Mr. Simmons engaged in this course of conduct, however, and only Mr. Simmons should be responsible

¹ The term "Respondents as used in this brief refers to all Respondents with the exception of Mr. Simmons. All individual Respondents will be referred to by their last names, with the exception of Peter Suen Suk Tak, who will be called "Mr. Suen." Forex Investment Services Corporation will be referred to as FISC; Eastern Vanguard Forex Limited will be referred to as "EVFL", while Eastern Vanguard Group will be referred to as "EVG." Finally, Y&T, Inc. will be referred to as "Tokyo." Hearing Exhibits will be cited herein as "(Ex. __.)". The hearing transcripts will be cited as "(R.T. __/__/98, at __.)"

² Respondents still claim that the Commission lacks jurisdiction over this matter, and the arguments in this brief in no way constitute a waiver of that argument. Rather, this brief addresses the substantive issues that would be present if the Commission wrongfully assumes jurisdiction.

1 for any wrongdoing. In fact, a search of the hearing transcripts revealed that Mr. Simmons' name was
2 mentioned 1,717 times during the hearing, yet he was not even present. No other Respondent can claim
3 that distinction.

4 In contrast to the actions of Mr. Simmons, FISC instituted an in-depth training program; FISC
5 made its traders well aware of the risks of foreign currency trading; and FISC never instructed traders to
6 make misrepresentations or defraud investors. FISC's investors were all required to read and sign
7 detailed disclosure documents. Further, FISC's investors received daily or weekly account statements
8 describing in detail the exact condition of their accounts. Finally, the undisputed evidence at the hearing
9 was that all investors' losses were due to market conditions and not any alleged misrepresentations. The
10 remaining Respondents should never have been named, and the Commission should not reward the
11 Division for making this case larger and infinitely more complicated than it is. This brief will first
12 discuss FISC's training program and disclosure documents and will then make the following arguments:
13

14 1. Respondents FISC, EVFL, Tokyo, Mr. Cho, Mr. Tam, Ms. Yuen, Mr. Cheng and
15 Mr. Sharma have no primary liability for any violations of the Arizona Securities Act. (hereinafter "the
16 Securities Act" or "the Act.")
17

18 2. Respondents EVG, Tokyo, Mr. Tam, Ms. Yuen, Mr. Cheng, Mr. Sharma, Mr. Lee and
19 Mr. Suen are not liable as controlling persons pursuant to A.R.S. § 44-1999 for any violations of the
20 Act.
21

22 3. None of the Respondents have violated the anti-fraud provisions of the Act.

23 4. The Commission must use its discretion and only order Mr. Simmons to pay restitution and
24 an administrative penalty.
25

26 ...

27 ...

1 **II. FISC's training program and disclosure documents were designed to educate its traders and**
2 **to ensure that investors received full disclosure.**

3 The simplest way to establish that none of the Respondents violated the Securities Act is to
4 analyze FISC's training program. FISC's training program was designed to educate its traders regarding
5 foreign currency trading. A small portion of the training was devoted to how to discuss investments in
6 FISC with potential investors. A review of the training program reveals that FISC took great lengths to
7 explain foreign currency training to its traders, to highlight the risks involved, and to ensure that traders
8 did not make any misstatements to potential investors. Mr. Simmons' inability to follow FISC's
9 guidelines and his affirmative misstatements should not be imputed to the remaining Respondents.

10 The evidence regarding FISC's training program is particularly compelling because it came
11 primarily from Division witnesses William Nagorny and Willis Scott, both of whom went through the
12 program. The formal training program at FISC lasted for approximately two months, but traders were
13 told that they needed to constantly continue to educate themselves regarding foreign currency trading.
14 The training included classroom instruction, drills, an examination, and mock trading. The FISC
15 training program was so invaluable and informative that Mr. Scott features it on his resume. (R.T.
16 8/28/98, at 301-02; Ex. R-8.) The following is a non-exhaustive list of the numerous topics covered
17 during FISC's training program:
18

- 19 1. The factors that could affect the value of a particular currency;
- 20 2. What a market order was;
- 21 3. How to open and close a position;
- 22 4. What a limit order was;
- 23 5. The procedures for placing an order at FISC;
- 24 6. The set-up of FISC's office;
- 25 7. The identity of FISC's "dealer," and the dealer's responsibilities;
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- 27

- 1 8. How to calculate profit and loss for a particular trade;
- 2 9. How to minimize losses;
- 3 10. What "floating profit and loss" were;
- 4 11. What a "breaking point" and a "tolerance level" were;
- 5 12. What technical and fundamental analysis were;
- 6 13. How to use technical analysis to make trades; and
- 7 14. How to calculate "support" and "resistance" levels;

8
9 (R.T. 8/28/98, at 291-94, 298-300, 304-07; R.T. 9/1/98, at 646-51.)

10 The training program also had numerous handouts, which are found in exhibits R-9 through R-36.
11 Traders were specifically instructed regarding the risks and pitfalls of foreign currency trading, the
12 cardinal mistakes in foreign currency trading, and the myriad ways by which traders could lose their
13 money. (Ex R-12.) Traders also received a document that talked specifically about the risks in foreign
14 currency trading and explained that most foreign currency traders were unsuccessful. (Ex. R-13.) These
15 materials, which were specifically reviewed with the traders, were replete with references to the
16 incredibly risky nature of foreign currency trading. (R.T. 8/28/98, at 320-31; R.T. 9/1/98, at 653-56; Ex.
17 R-12, R-13.) The testimony of Mr. Nagorny and Mr. Scott, along with the reams of material provided
18 by FISC, ensured that no individual who sat through the training program would be unaware of the
19 tremendous risk in foreign currency trading.
20

21 FISC's Customer Agreement and Risk Disclosure Statement were also designed to ensure that
22 FISC investors were fully advised of the risks of foreign currency trading. (See Ex. R-47-48.) These
23 documents were signed by all FISC investors at the time they invested. Mr. Nagorny recounted how the
24 instructors in the training program went over the Customer Agreement and Risk Disclosure Statement
25 line-by-line to ensure that the traders understood it and could explain it to potential investors. (R.T.
26
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1 9/1/98, at 667-678.) Mr. Cho specifically told the traders that they had to review the Risk Disclosure
2 Statement with all potential investors; that they must discuss risk with potential clients; and that they
3 must not make any promises or guarantees. (R.T. 8/28/98, at 207-08; R.T. 10/8/98, at 2186-93.)

4 Further, these documents contained numerous statements regarding the speculative nature of an
5 investment in foreign currency trading. The language in this documents is crucial because it is
6 undisputed that all FISC investors received and signed a Customer Agreement and Risk Disclosure
7 Statement. Some excerpts from the disclosure documents are as follows:

8
9 1. The Risk Disclosure Statement required the customer to sign and acknowledge "reading
10 and understanding and accepting the Risk Disclosure Statement."

11 2. The Risk Disclosure Statement stated that "[t]he risk of loss in trading spot currencies,
12 hereinafter called investment contracts, can be substantial."

13 3. The Risk Disclosure Statement further stated that "[t]he customer should carefully consider
14 whether such trading is suitable for customer, in light of customer's financial resources."

15 4. The Risk Disclosure Statement also stated that "[t]he customer may sustain a total loss of
16 the initial margin funds."

17 5. The Risk Disclosure Statement also talked about stop orders, but stated that "EVF will not
18 guarantee execution of such stop loss orders in volatile markets."

19
20 (Ex. S-57.)

21 6. The Customer Agreement included, but was not limited to, the following disclosures:

22 a. "Any consequences whatsoever that may result from the investment orders of
23 customer, customer hereby acknowledges and admits that customer will take full obligation and
24 responsibility."
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1 b. "Although such orders may be based on opinion given by any one of EVF
2 employees or independent investment consultants or agents, customer hereby further acknowledges and
3 admits that customer fully understands that such opinion does not assure customer of any profit resulting
4 from such trading."

5 c. "The customer declares that the contents of this agreement have been fully
6 explained to customer in a language customer understands and that customer is in agreement with the
7 contents of this agreement."

8 (Ex. S-57.)
9

10 Individuals who did not trade their own accounts at FISC signed a document entitled "Addendum
11 to Customer Agreement." (Ex. S-57.) The following excerpts from the Addendum emphasized the risks
12 of an investment with FISC:

13 1. "As the servicing company between Eastern Vanguard Forex Ltd. and it's clients, [FISC]
14 sincerely appreciates your business and to assure the total commitments to our professional codes and
15 ethical conducts, and to provide protection in the best interest of our clients against any financial
16 sufferance arising from misleading information, misrepresentation, and the extreme extent [sic], possible
17 occurrence of fraud, it is our duty and responsibility to inform you that our company policy strictly
18 prohibits our employees, agents, and/or officers to make promises or to enter into any agreements, oral
19 or written, with our clients to engage in certain activities. These restricted activities include, but [are]
20 not limited to, profit sharing schemes, profit guaranteeing schemes, and/or the receiving of any award
21 whether in cash or in any other forms."

22
23 2. "Any track record, Forex Exchange investment portfolio profit earnings, positive rate of
24 [return] or trading transactions and any or all activities previously presented by anyone should not be
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1 considered as an indication and/or representation, and/or promise, and/or guarantee of any profits in
2 actual trading.”

3 (Ex. S-57.)

4 The training program also provided specific instruction that traders were *not* to make
5 misrepresentations to potential investors. (R.T. 9/8/98, at 2186-93.) As the following excerpts from
6 Mr. Scott’s testimony demonstrate, Mr. Cho went out of his way ensure that traders provided full and
7 accurate disclosure to potential investors:

8 Q. [MR. BASKIN] . . . Isn't it true that Michael told you that you have to disclose the risk to
9 customers, to potential customers?
10

11 A. You mean give it to them or tell them about it?

12 Q. Tell them about it, tell them that there's risk involved.

13 A. Yes.

14 Q. Isn't it true that Michael told you that you could lose money and you could lose a lot of
15 money in currency trading?
16

17 A. Yes. He did state that.

18 Q. Isn't it true that Michael said it was a very high risk market, or words to that effect?

19 A. I believe so. Yes.

20

21 Q. And it's Michael that said don't steal from grandma?

22 A. Yes.

23 Q. And didn't Michael say that if any trader made a specific promise of a return, that they
24 would be let go?
25

26 A. I believe he did say that. Yes.
27

1 Q. And didn't Michael say that if anyone made any guarantees to customers, that the firm
2 would have to let them go?

3 A. I believe he also said that, too.

4 Q. Michael never told you to go out and tell particular potential customers that I promise
5 you're not going to lose more than X amount of money on your account?

6 A. No. He never stated that.

7 Q. And did he ever tell you to exaggerate or lie about your trading abilities?

8 A. No. I kind of don't understand the question.

9 Q. Did he ever tell you to go out and say I'm the best damn trader there is?

10 A. No.

11 Q. Michael's the one that told you that Mr. Simmons was incorrect when he made the
12 statement that Eastern Vanguard was affiliated with the Vanguard family of funds, correct

13 A. That's correct.

14 (R.T. 8/28/98, at 350-52.)

15 FISC and Mr. Cho were committed to giving accurate information to investors. Otherwise, we
16 would have heard a completely different story from Mr. Scott and Mr. Nagorny. The statements made
17 by Mr. Simmons were in direct conflict to the specific training provided by FISC. Mr. Simmons'
18 statements were obviously his own and no one else's, and the remainder of this brief establishes that
19 none of the Respondents are legally responsible for Mr. Simmons' conduct.

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22 **III. The Division has failed to establish that Tokyo, Mr. Cho, Mr. Tam, Ms. Yuen, Mr. Cheng**
23 **and Mr. Sharma have primary liability for any violations of the Arizona Securities Act.**

24 The Division alleges that Tokyo, Mr. Cho, Mr. Tam, Ms. Yuen, Mr. Cheng and Mr. Sharma have
25 primary liability for the alleged violations of the Arizona Securities Act. The applicable caselaw and the
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1 evidence presented at hearing establish that the Division is wrong and all allegations against the above
2 Respondents must be dismissed.

3 **A. Law regarding participant liability.**

4 If the Commission errs and concludes that it has jurisdiction over this matter, it must still
5 determine whether Respondents offered or sold investments in FISC within the meaning of A.R.S. §
6 44-1841(A) and 44-1991. A.R.S. § 44-2032(1) authorizes the Division to bring administrative actions
7 against any “person” who violates the Act. Pursuant to A.R.S. § 44-2003, however, liability for
8 violations of the Act extends only to individuals who “made, participated in or induced the unlawful sale
9 or purchase...” A.R.S. § 44-2003; *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 17-23,
10 945 P.2d 317, 328-34 (App. 1996) *review denied*, October 21, 1997.

12 The Arizona Court of Appeals has recently set forth the standard necessary to establish liability for
13 “participating” or “inducing” the sale of securities for purposes of A.R.S. § 44-2003. *Standard*
14 *Chartered*, 190 Ariz. at 17-23, 945 P.2d at 328-34.³ The court held that a party must “partake” in the
15 sale of securities in order to “participate” in the transaction. *Id.* at 21, 945 P.2d at 332. To induce the
16 sale of securities, a party must purposefully or intentionally cause the sale. *Id.* at 21-22, 945 P.2d at
17 332-33. Likewise, a party must “persuade” or “prevail” upon another individual to buy a security in
18 order to “induce” the sale of securities. *Id.* at 21-22, 945 P.2d at 332-33.

20 The court further held that to make, participate in or induce the sale of a security: 1) a party must
21 have more than a collateral role in the sale; and 2) any alleged misstatements made by the party must go
22

23
24
25 ³ The *Standard Chartered* decision construed the terms “participated in” and “induced” under the former version of
26 A.R.S. § 44-2003, which applied only to actions brought under A.R.S. §§ 44-2001 and 44-2002. A.R.S. § 44-2003, however,
27 has been amended, and now also applies to actions brought under A.R.S. § 44-2032. The amended version of A.R.S. §
44-2003 includes the “participated in” and “induced” language that was in the earlier version of the statute. Also, the court in
Standard Chartered declined to apply caselaw construing the federal securities statutes. 190 Ariz. at 18, 945 P.2d at 329.
Accordingly, the Commission must defer to the court’s interpretation of A.R.S. § 44-2003.

beyond “merely [having] the effect of influencing a buyer” to purchase the security. *Id.* at 22, 945 P.2d at 333.

B. The Division presented no evidence that Respondents Tokyo, Mr. Tam, Ms. Yuen, Mr. Cheng and Mr. Sharma are primarily liable for any violations of the Arizona Securities Act.

The Commission must summarily dismiss the allegations that Respondents Tokyo, Mr. Tam, Ms. Yuen, Mr. Cheng and Mr. Sharma are primarily liable for any violations of the Arizona Securities Act because the Division presented no evidence to that effect at the hearing. It is undisputed *that none of the FISC investors ever met, talked to, saw or heard of* any of the above individuals regarding a potential investment prior to making their decision to invest.⁴ Further, none of the investors testified that they were investing their money with Tokyo or that they thought Tokyo was involved with their investment.

There is thus no evidence that any of the above sold an investment in FISC, or “partook” in, purposefully caused, or persuaded *anyone* to invest in FISC. *Standard Chartered*, 190 Ariz. at 21-22, 945 P.2d at 332-33. Accordingly, it was impossible for the above to have made, participated in or induced the sale of investments in FISC, and they cannot be primarily liable. *Id.* The primary liability allegations against the above must be dismissed.

C. Mr. Cho should not be held primarily liable for any violations of the Securities Act.⁵

The Division is likely to argue that Mr. Cho is somehow primarily responsible for all of the investments made in FISC. As a threshold matter, Mr. Cho resigned from FISC on October 31, 1997, did not participate in the management of FISC after that date, was not paid by FISC after October 31st,

⁴ Although Mr. Nagorny and Mr. Scott may have heard of Mr. Tam prior to their investments, he played no role in their decisions to invest.

⁵ The Notice does not allege that Mr. Cho is liable as a controlling person and the Division is thus limited to arguing primary liability.

1 and cannot be responsible for any investments in FISC made after that time. (R.T. 10/8/98, at 2245-46;
2 R.T. 8/28/97, at 297.) This evidence was corroborated by Division witnesses William Nagorny and
3 Willis Scott, who were working for FISC when Mr. Cho left.⁶ The following discussion of the evidence
4 presented at the hearing establishes that Mr. Cho is not primarily liable for any violations of the Act.

5 **1. Mr. Cho did not sell an investment in FISC to Alan Davis.**

6 Alan Davis' testimony was an unfortunate example of an individual who has lost money and was
7 willing to say and do anything that may help him recover his funds, regardless of whether the truth goes
8 trampled in the process. Mr. Davis was a friend of Mr. Simmons from Roadway, and Mr. Simmons
9 made a series of misrepresentations to Mr. Davis to induce him to invest. Mr. Simmons, *not Mr. Cho*,
10 made these statements and sold the FISC investment to Mr. Davis. On direct examination, Mr. Davis
11 testified in great detail regarding a meeting he had at FISC with Mr. Simmons prior to making his
12 decision to invest in FISC. (R.T. 8/27/98, at 111-17.) Mr. Davis specifically testified that he did *not*
13 meet Mr. Cho during his first visit to FISC. (*Id.* at 117.) Rather, after meeting with Mr. Simmons,
14 Mr. Davis was very "excited" because of all the statements *Mr. Simmons* made to him. (*Id.* at 117-18.).
15 Mr. Davis: "went home and talked with my wife, and *we decided to open an account* up with Forex
16 through James." (*Id.* at 119.)

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18
19 *After* deciding to invest, Mr. Davis went to the FISC offices for a second meeting, and Mrs. Davis
20 came with him. (*Id.* at 126-27.) At this meeting, the Davises met with Mr. Simmons, who reviewed the
21 customer agreement with them and completed the necessary paperwork. (*Id.*) Only "*after*" the new
22 account paperwork was completed did Mr. Davis meet Mr. Cho. (*Id.* at 138.) According to Mr. Davis,
23 Mr. Cho "just said, congratulations for opening an account, and just, we were introduced." (*Id.* at
24

25
26 ⁶ Mr. Cho returned to FISC in early December 1997 to assist Ms. Shumway in closing her account, and he also met with Alan
27 Davis at that time. (R.T. 10/8/98, at 2250-51.) Mr. Cho returned to FISC as a favor to Mr. Tam to help assist him with
customer problems caused by Mr. Simmons and was not compensated for his efforts. (*Id.*)

1 138-39.) Mr. Davis agreed that there was “*no doubt in [his] mind*” that he met Mr. Cho for the first time
2 *after* he had invested and Mr. Cho performed the ministerial task of receiving Mr. Davis’ check. (R.T.
3 9/9/98, at 868.)

4 After describing in detail on direct examination the *two* meetings he had with Mr. Simmons at
5 FISC, there was a break of over one week before Mr. Davis completed his testimony. Unfortunately for
6 Mr. Davis, the gap between his testimony affected his ability to keep his story straight regarding some
7 very basic information, which is the type of problem that only afflicts those who take liberties with the
8 truth. When Mr. Davis was cross-examined, he was asked an innocuous question regarding his earlier
9 testimony that he met with Mr. Simmons at FISC and then came back a second time to invest. (R.T.
10 9/9/98, at 865.) Mr. Davis altered his testimony and testified very specifically that the *first* time he went
11 to FISC’s office is when he invested and that he had never previously been to the office. (*Id.* at 865-67.)
12 He continued to change his testimony and stated that Mr. Simmons mailed the new account
13 documentation to him, whereas he had previously testified that Mr. Simmons had given him this
14 documentation at the first meeting. (*Id.* at 867; R.T. 8/27/98, at 120.)

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16
17 Changes in testimony such as Mr. Davis’ must not be taken lightly. He did not forget a detail; *he*
18 *eliminated an entire meeting that had been a primary focus of his earlier testimony.* The only thing that
19 is certain is that Mr. Davis fabricated his story. Unfortunately, counsel lacks the wisdom to know *which*
20 story or which portions of Mr. Davis’ story were fabricated. The Commission must give no weight to
21 this witness’ testimony.

22
23 In any event, according to *both* of Mr. Davis’ versions of events, the evidence at hearing
24 conclusively established that Mr. Simmons had a preexisting relationship with Mr. Davis; Mr. Simmons
25 made the pre-investment representations to him; Mr. Simmons met alone with Mr. Davis at FISC to
26 induce him to invest; Mr. Davis decided to invest before he met Mr. Cho; Mr. Simmons sold the FISC
27

1 investment to Mr. Davis; and Mr. Simmons completed the new account paperwork for the Davises.
2 Mr. Cho simply did not make, participate in or induce the sale of any investment to Mr. Davis.

3 **2. Mr. Cho did not offer or sell an investment in FISC to Melba and Dean Davis.**

4 After Alan Davis invested in FISC, he told his parents Dean and Melba Davis about his
5 investment, and his relationship with Mr. Simmons, and repeated to them the representations "*James*
6 [*Simmons*]" had made to them regarding the expected return on an investment with FISC. (R.T.
7 8/28/98, at 421-22.) "After I had met with James at work and spoke to him and opened my account, I
8 was excited and I went home and told my parents about my new investment and what it would do, and
9 explained it to my father and mother." (R.T. 9/9/98, at 739.) Mr. Davis then spoke with Mr. Simmons,
10 not Mr. Cho, about the possibility of the elder Davis' investing. (*Id.* at 741-742.)

11
12 Dean and Melba decided to invest based on information *Alan* provided them about FISC. (*Id.* at
13 743-44; R.T. 9/10/98, at 1014-17.) In particular, Melba invested based on information she believed
14 Alan was getting from Mr. Simmons; not Mr. Cho. (R.T. 9/10/98, at 1014-17.) *After* the elder Davis'
15 made their decision to invest, they met with Mr. Simmons at FISC to formalize their investment. (R.T.
16 9/9/98, at 745-46.) The Davises did not meet Mr. Cho until *after* they had completed the documents
17 evidencing their investment. (*Id.* at 747; R.T. 9/10/98, at 967.) In other words, Mr. Cho did not sell the
18 FISC investment to Melba and Dean Davis; Alan Davis and James Simmons did.

19
20 **3. Mr. Cho did not offer or sell an investment in FISC to Ruth and Van**
21 **Shumway.**

22 Van and Ruth Shumway invested in FISC after learning about it from Dean Davis and then
23 meeting with Mr. Simmons. (R.T. 9/10/98, at 1062-75.) Before investing in FISC, the Shumways made
24 two visits to FISC's office. They met Mr. Cho during their first visit and did nothing more than
25 exchange pleasantries. (R.T. 9/14/98, at 1425.) The Shumways next met Mr. Cho *after they had*
26 *invested and given their check to Mr. Simmons.* (R.T. 9/10/98, at 1071-78.) According to
27

1 Ms. Shumway, Mr. Cho "just greeted us and said that he was happy that we had decided to invest with
2 him, just the usual." (R.T. 9/10/98, at 1082.) Further, Ms. Shumway agreed that she was not "terribly
3 concerned" about asking questions of Mr. Cho because the Shumways were dealing with Mr. Simmons
4 and they believed Mr. Simmons would give them all necessary information about FISC. (R.T. 9/14/98,
5 at 1425.)

6 **4. Mr. Cho did not offer or sell an investment in FISC to Michael Noriega**

7 Mr. Noriega worked at Roadway with Alan Davis, who referred Mr. Noriega to Mr. Simmons for
8 an investment in FISC. (R.T. 9/11/98, at 1202-04.) Mr. Noriega then had several conversations with
9 Mr. Simmons regarding FISC, and based upon Mr. Simmons' recommendations, decided to open an
10 FISC account. (*Id.* at 1203-07.) According to Mr. Noriega, Mr. Simmons "was the person that I knew
11 and I trusted." (*Id.* at 1208.) As was the case with the Davises and the Shumways, Mr. Cho played no
12 role in Mr. Noriega's investment decision, nor did Mr. Cho solicit an investment from Mr. Noriega.
13 Rather, Mr. Simmons introduced Mr. Noriega to Mr. Cho *after* Mr. Noriega gave his check to
14 Mr. Simmons. (*Id.* at 1211-12.) Further, on cross-examination, Mr. Noriega admitted that when he met
15 Mr. Cho, they did not discuss Forex trading or anything else, because Mr. Noriega was relying on
16 Mr. Simmons. (*Id.* at 1264.)

17 **5. Mr. Cho did not offer or sell an investment in FISC to Willis Scott.**

18 As detailed above, Mr. Scott went through the training program at FISC, and subsequently opened
19 an account. He opened his account, however, with full, first-hand knowledge of the risks associated
20 with foreign currency trading. In fact, during his mock trading at FISC, he achieved extremely poor
21 results in his account. (R.T. 8/28/98, at 373-74.)

22 Mr. Scott opened his account on October 30, 1997, the day before Mr. Cho left FISC, and did not
23 make any trades until after Mr. Cho left FISC. (R.T. 8/28/98, 297, 361, 370; Ex. R-38.) Mr. Scott and
24

1 everyone else at FISC knew Mr. Cho was leaving when he (Mr. Scott) opened his account. (R.T.
2 8/28/98, at 361; R.T. 10/8/98, at 2245.) Mr. Scott testified that Mr. Cho left FISC "within a day of me
3 actually opening my account," and Mr. Scott was aware that Mr. Cho would not be helping manage his
4 account. (*Id.* at 297, 361.)

5 Mr. Cho was extremely concerned about Mr. Scott's ability to manage his account. (R.T. 10/8/98,
6 at 2247-48.) Mr. Cho told Mr. Scott that he was not in favor of Mr. Scott opening an account and urged
7 him (Mr. Scott) to exercise extreme caution in his trading. (*Id.*) According to Mr. Scott, when he
8 decided to open his account, he had the following interaction with Mr. Cho: "He [Mr. Cho] asked me if
9 he thought -- he asked me if I was sure I could do it, and I told him I believed I could. And he wished
10 me luck, and we shook hands, and he left shortly afterwards." (R.T. 8/28/98, at 404.)

11 Mr. Scott consulted with Mr. Simmons regarding what trades to make in his account, but
12 ultimately made his own decisions. (*Id.* at 297-98, 361-62, 373-75.) Mr. Scott's testimony regarding
13 Mr. Cho's complete lack of involvement with his account is compelling: "*Michael didn't make any*
14 *decisions as far as, you know, going over what I need to do or anything else to make the decisions I*
15 *made. I don't hold him to be responsible for bad decisions that I made.*" (*Id.* at 298.) Mr. Scott's point
16 is well taken.

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19 **6. Mr. Cho did not offer or sell an investment in FISC to Julius Nagorny.**

20 William Nagorny, not Mr. Cho, offered and sold an investment in FISC to his father, Julius
21 Nagorny. William Nagorny also went through the training program described above, and testified that
22 he never would have induced his father to invest had he been troubled by *anything* in the training
23 program. (R.T. 9/1/98, at 664.) He was well aware of the risks involved in foreign currency trading; he
24 had in-depth instruction regarding FISC's disclosure documents; he solicited his father for an investment
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1 in FISC; and he did all of the trading and made all of the ultimate decisions in his father's account.
2 (R.T. 9/1/98, at 621-22, 664-66, 687.)

3 Mr. Cho *never* talked to Julius Nagorny about FISC. (R.T. 10/8/98, at 2248-49.) Further, the
4 Nagorny account was opened on October 28, 1997, three days before Mr. Cho left FISC; its first trades
5 were *after* Mr. Cho had left; and Mr. Cho played no role in the management of the account. (R.T.
6 10/8/98, at 2248-49; R.T. 9/1/98, at 627-28, 685-87.)

7 The following colloquy reveals that the responsibility for the losses in the Nagorny account
8 belongs with no one other than Mr. Nagorny:
9

10 Q. [MR. BASKIN] So you wanted supervision, but you continued to just -- you continued to
11 trade, despite the fact that you weren't getting that supervision, correct?

12 A. [MR. NAGORNY] Yes.

13 Q. Didn't you tell me that you wanted to keep trading because you liked doing this?

14 A. I liked the technical analysis, and I liked that this was an investment job.

15 Q. And because this was your dad's account, and because you were doing the trading, you at
16 any time could have pulled up the stakes, correct?
17

18 A. Yes.

19 Q. You could have stopped, correct?

20 A. Yes.

21 Q. There was never a time when you had to make a trade, correct?

22 A. Correct.

23 Q. And if you had been concerned about the lack of supervision, about the stop loss problems
24 that you talked about earlier, and about the volatility of the currency markets, you just
25 could have pulled the plug and walked away, correct?
26
27

1 A. Yes.

2 Q. And as close as one week before we get into the yen situation, you could have walked away
3 with over \$49,000, correct?

4 A. Correct.

5 Q. But you decided you wanted to keep trading, correct?

6 A. I wanted to. Yes.

7 Q. And you decided to keep trading, despite the fact that you didn't have the supervision you
8 wanted, correct?

9 A. Correct.

10 Q. Despite the fact that you felt bad about had happened with the stop losses?

11 A. Yes.

12 Q. And you also had a sense by this point that the market was volatile –

13 A. Yes.

14 (R.T. 9/1/98, at 629-31.)

15
16 The above excerpt is only a portion of the testimony establishing that Mr. Nagorny was the
17 individual responsible for inducing his father to invest and for losing his money. Mr. Cho was not part
18 of the Nagorny investment equation; he did not offer or sell any investment in FISC to Julius Nagorny;
19 and he did not participate in the management of the account. Accordingly, he has no liability for
20 Mr. Nagorny's investment.
21

22 **7. Mr. Cho should not be liable for any of the losses in Joseph Saxon's account.**

23
24 Probably the tallest tales told at the hearing came from FISC investor Joseph Saxon. Mr. Saxon, a
25 college graduate with a degree in criminal justice, went through the training program at Tokyo in San
26 Francisco in 1995. (R.T. 9/17/98, at 1831, 1837.) He then worked as a trader for Tokyo, and had *two*
27

1 accounts at Tokyo in 1996 prior to opening his FISC account in 1997. (R.T. 10/8/98, at 2266, 2269.) In
2 addition to his college education and experience as a trader at Tokyo, Mr. Saxon took a two year long
3 class in investments and received a "certificate." (R.T. 9/17/98, at 1831-36.)

4 While Mr. Saxon attended Tokyo's training program, he learned, among other things, about the
5 risk in the currency markets, how to open and close positions, how to read account statements, and how
6 to determine whether he had lost or made money on a trade. (R.T. 9/17/98, at 1839, 1843-44; R.T.
7 10/8/98, at 2264-65; R.T. 10/13/98, at 2584.) Mr. Cho traded Mr. Saxon's first account at Tokyo, which
8 Mr. Saxon closed with a profit. (R.T. 10/8/98, at 2267-68.) Mr. Saxon testified in great detail regarding
9 his ability to "freeze" and close the first account after it had earned a profit. (R.T. 9/17/98, at 1850-58.)
10 In doing so, Mr. Saxon demonstrated his knowledge of and ability to complete the relevant forms
11 required by Tokyo to close his account. (*Id.*; R-56.)

13 Mr. Saxon opened a second account at Tokyo in September 1996, which he traded by himself.
14 (R.T. 9/17/98, at 1858-59.) When Mr. Saxon traded his own account he picked the positions to open; he
15 completed order tickets; he studied his account statements; and he made his own decisions. (R.T.
16 9/17/98, at 1822-24; R.T. 10/8/98, at 2270.) Further, Mr. Saxon read about currencies, had computer
17 software related to technical analysis and also subscribed to informational services regarding
18 investments. (R.T. 10/8/98, at 2270.) The second account, however, lost money. (R.T. 9/17/98, at
19 1821-22.) Mr. Saxon closed the account, and he was once again able to successfully use the documents
20 required by Tokyo to do so. (R.T. 9/17/98, at 1868-69; R-62.)

22 After he closed his second account, Mr. Saxon learned that Mr. Cho had accepted a position with
23 FISC and contacted Mr. Cho in Phoenix. (R.T. 10/8/98, at 2273-74.) Mr. Saxon told Mr. Cho that he
24 had been very successful trading futures since he had left Tokyo. (*Id.* at 2275.) Mr. Saxon asked
25 Mr. Cho to trade his account and also asked Mr. Cho to send him the FISC new account documentation.
26
27

1 (*Id.* at 2276.) When Mr. Saxon spoke with Mr. Cho about opening a Phoenix account, Mr. Cho never
2 made any promises or guarantees to Mr. Saxon. (*Id.* at 2276-77; R.T. 9/17/98, at 1871-72.) Mr. Cho
3 merely told Mr. Saxon that he would manage the account to the best of his ability. (R.T. 9/17/98, at
4 1871-72.)

5 Mr. Saxon deposited \$30,000 and permitted his account to lose nearly all of that money.
6 According to Mr. Saxon, on June 5, 1997, after his account declined from \$30,000 to \$17,000 he
7 contacted Mr. Cho because he wanted to close his account due to “cash flow” problems. (R.T. 9/11/98,
8 at 1347, 1349.) Mr. Saxon then alleged that Mr. Cho and he agreed that Mr. Cho would close the
9 account if its equity reached \$35,000. (*Id.*) Mr. Saxon made the novel claim that Mr. Cho was supposed
10 to double his account (take it from \$17,000 to \$35,000) by “being conservative and preserv[ing] my
11 capital.” (R.T. 9/11/98, at 1350-51; R.T. 9/16/98, at 1879-80.) Mr. Saxon claimed that Mr. Cho
12 disregarded his instructions and failed to close the account when its equity exceeded \$35,000. A careful
13 analysis of Mr. Saxon’s account reveals that his version of events can only be characterized as fiction.
14

15 As a threshold matter, Mr. Saxon’s allegation that he had “cash flow” problems and called
16 Mr. Cho on June 5, 1997 to close his account is false. Mr. Saxon admitted on cross-examination that it
17 was not his intention to close the account when he called Mr. Cho on that day. (R.T. 9/17/98, at
18 1877-78.) If he truly had “cash flow” problems, he would have closed the account without hesitation.
19 Because this conversation forms the basis of the alleged “agreement,” and because Mr. Saxon lied, this
20 testimony calls into question the remainder of Mr. Saxon’s version of events.
21

22 Further, having had two previous accounts, Mr. Saxon was extremely well-informed regarding two
23 key matters: 1) the volatility associated with trading foreign currencies; and 2) the procedures for
24 closing an account. (R.T. 9/17/98, at 1850-58, 1868-69, 1881-82; R-59, R-62.) Further, Mr. Saxon
25
26
27

1 regularly checked his account balance at FISC, and he called so frequently that he even knew that one of
2 FISC's employees was pregnant. (R.T. 9/11/98, at 1348-49; R.T. 9/17/98, at 1884.)

3 Within a week of his alleged "agreement" with Mr. Cho, Mr. Saxon's account had doubled and
4 was worth over \$34,000, and on June 13, 1998 its equity exceeded \$36,000. Mr. Saxon claimed that he
5 did not know of the June 13 balance until a "week" or "days" after that date, but he also acknowledged
6 being aware of the June 13 balance when he talked to Mr. Cho later in June. (R.T. 9/11/98, at 1354;
7 R.T. 9/17/98, at 1887.) Despite his knowledge of the June 13th balance, Mr. Saxon did not 1) ask FISC
8 to close his account; or 2) confront Mr. Cho for failing to close the account on June 13th. As the equity
9 in his account increased, Mr. Saxon's "cash flow" problem apparently disappeared.
10

11 Mr. Saxon's cross-examination regarding the events of late June 1997 established the far-fetched
12 nature of his testimony:

13 Q. [MR. BASKIN] Just so I can understand your testimony, the 26th [of June] is the day that
14 you learned that your balance was at \$37,000 and change, but Michael was not around;
15 correct?
16

17 A. [MR. SAXON] That's right. I asked for Michael, that's correct.

18 Q. And you did not -- did you ask the staff to page Michael?

19 A. No. I just asked if Michael was there, and he wasn't available.

20 Q. And when they said he wasn't available, did you tell them that you had a very important
21 message that you wanted them to get to Michael?

22 A. No, sir, I didn't.

23 Q. Did you tell them that you had an agreement with Michael to close your account when the
24 balance was over \$37,000, and they needed to contact him immediately?
25

26 A. No, sir, I didn't.
27

1 Q. Did you -- and it's clear you did not tell them to close your account; correct?

2 A. That is correct.

3 Q. And you didn't FAX in any of these withdrawal documents on this date also; correct?

4 A. That's correct

5 Q. And it wasn't until the next day, which was the 27th, that you talked to Michael; correct?

6 A. That's correct, sir.

7 Q. And by then your account was down to \$23,000 and change; correct?

8 A. That's correct.

9 Q. And we're talking about June 27th; right?

10 A. Uh-huh, yes.

11 Q. And it's your testimony that on June 27th, you did not tell Michael to close the account

12 correct?

13 A. That's correct.

14 Q. And you did not, on June 27th, inform anyone at FISC, Tokyo International, or Eastern

15 Vanguard Group about your agreement with Michael and how he had violated it; correct

16 A. That's correct, sir.

17 Q. And it's also correct that you did not ask that FISC assign another trader to your account at

18 this time; correct?

19 A. That's correct, sir.

20 Q. And you did not instruct anyone at FISC to close your account until August 13th of 1997;

21 is that; correct....

22 A. Right....

23

24

25

26

27

1 Q. And the way that you closed your account on August 13th, 1997, was by sending in a
2 payment instruction asking for whatever you had left in your account and signing it; is that
3 correct?

4 A. That's correct, sir.

5 Q. And after you sent in that payment instruction, you received a check for the \$473 and
6 change; correct?

7 (R.T. 9/17/98, at 1890-92.)

8
9 In other words, Mr. Saxon, despite all of his education, despite all of his experience at Tokyo,
10 despite his so-called risk averse personality, despite his alleged need for "cash flow," despite his
11 knowledge and ability regarding how to quickly close his account at FISC, despite all of his
12 conversations with the FISC staff, and despite his alleged knowledge that Mr. Cho had several times
13 disregarded his instructions to close the account, wants the Commission to believe that he was helpless,
14 and was incapable of asking FISC to close his account. His testimony can only be characterized as
15 perjurious and must be given no weight.

16
17 The Commission should also remember that Mr. Saxon is the same individual who not only filed a
18 lawsuit against Mr. Cho and Tokyo, but also embarked on a smear campaign against Tokyo. (R.T.
19 9/17/98, at 1894-96.) He produced slanderous materials regarding Tokyo, packaged it with a Division
20 press release and then began distributing it to the public. (*Id.*; R-71-72.) He then showed up at
21 Mr. Cho's house and told Mr. Cho's parents that Ms. Cho should cooperate with the Division. (R.T.
22 9/17/98, at 1989-99.) When Mr. Saxon's enormous bias is coupled with the remarkable nature of his
23 testimony, it is obvious that he is lacking in candor. The Commission must reject his testimony in its
24 entirety.
25
26
27

1 **IV. The Division has failed to establish that any of the Respondents have controlling person**
2 **liability for the alleged violations of A.R.S. § 44-1991.**

3 **A. Introduction**

4 The Division alleges that the following Respondents are liable as controlling persons, pursuant to
5 A.R.S. § 44-1999, for other individuals' violations of A.R.S. § 44-1991: EVG, Tokyo, Mr. Tam,
6 Ms. Yuen, Mr. Cheng, Mr. Sharma, Mr. Wing, Mr. Suen (Peter Suen Suk Tak) and Mr. Zhang. The
7 controlling person allegations are the *only* allegations related to EVG, Mr. Wing, Mr. Suen and
8 Mr. Zhang. With the exception of Mr. Tam, and some other minor exceptions, the Division sought to
9 prove its allegations against the above individuals by introducing corporate records simply stating that
10 the above had a title or occupied some position with EVFL, Tokyo, EVG or FISC. Some of the titles
11 referred to are also the subject of a stipulation filed by the parties. (Ex. S-161.) The Division also
12 introduced evidence that Mr. Wing visited the Phoenix office at least once. This evidence does not meet
13 the ninth circuit standard for proving controlling person liability. The below sections will discuss the
14 law regarding control person liability and will then highlight the complete lack of evidence supporting
15 the Division's allegations.
16

17 **B. Law regarding control person liability**

18 A.R.S. § 44-1999 states, in pertinent part, that "[e]very person, who, directly or indirectly, controls
19 any person liable for a violation of A.R.S. § 44-1991....shall be liable jointly and severally with and to
20 the same extent as the controlled person to any person to whom the controlled person is liable unless the
21 controlling person acted in good faith and did not directly or indirectly induce the act underlying the
22 action." This provision mirrors Section 20(a) of the 1934 Securities Exchange Act. 15 U.S.C. § 78t(a).
23 There are no Arizona cases interpreting A.R.S. § 44-1999. Arizona courts, however, look to the United
24 States Supreme court and federal court decisions when interpreting provisions of the Securities Act that
25
26
27

1 are identical or similar to federal securities statutes. *Vairo v. Clayden*, 153 Ariz. 13, 734 P.2d 110 (App.
2 1987).

3 The Division's evidence against most of the Respondents appears to be that because they were
4 officers of certain entities, they must have violated the Act. An officer or director of a corporation is not
5 presumptively liable as a controlling person. *Kaplan v. Rose*, 49 F.3d 1363, 1382 (9th Cir. 1994);
6 *Arthur Children's Trust v. Keim*, 994 F.2d 1390, 1396-97 (9th Cir. 1993). Rather, to establish
7 controlling person liability, the Division must show that a primary violation was committed and that the
8 Respondents directly or indirectly controlled the violator. *Paracor Finance v. General Electric Capital*
9 *Co.*, 79 F.3d 878, 888-89 (9th Cir. 1996). In particular, the Division must show that 1) Respondents
10 actually exercised control over the corporate entities at issue; and 2) Respondents possessed the power
11 to control the activity upon which the primary violation was predicated. *Metge v. Baehler*, 762 F.2d
12 621, 631 (8th Cir) *cert. denied*, 474 U.S. 1057 (1986), *see also Brown v Enstar Group, Inc.*, 84 F.3d
13 393, 395 (11th Cir. 1996) *cert. denied*, 117 S.Ct. 950 (1997).
14

15 The determination of who is a controlling person is an intensely factual question involving
16 "scrutiny of the defendant's participation in the day-to-day affairs of the corporation and the defendant's
17 power to control corporate actions." *Paracor Finance*, 79 F.3d at 890 (quoting *Kaplan*, 49 F.3d at
18 1382). Courts do not inquire into an isolated corporate action by a defendant. *Id.*
19

20 The *Paracor* facts mirror the present situation as to several of the Respondents. In *Paracor*,
21 investors filed suit alleging federal securities violations against the CEO of a company that made a
22 debenture offering. 79 F.3d at 883. The court found that the CEO was not a controlling person,
23 although he was "at least consulted on every major decision." *Id.* at 890. The CEO knew the offering
24 was taking place and understood what the Placement Memorandum was supposed to disclose, but he
25 never read the Placement Memorandum himself. *Id.* He was involved in developing the sales
26
27

1 projections contained in the private placement memorandum, but “at the time, there was no way [the
2 CEO] could be aware that the projections would be used in the Placement Memorandum six months
3 later.” *Id.* The investors introduced evidence that the CEO was involved in the management of the
4 corporation, but no evidence he exercised direct or indirect control over the debenture offering in any
5 way. *Id.* at 891.

6 In holding that the CEO was not a controlling person, the court stated:

7 The investors *have introduced some evidence that Burton [the CEO] was involved*
8 *in the management of Casablanca, at least on major decisions. However, they have*
9 *introduced no evidence that Burton exercised direct or indirect control over the*
10 *debenture offering in any way. Burton was not authorized to act for Casablanca on*
11 *the matter and was not involved in the preparation of the offering materials. Nor*
have the Investors submitted any evidence that Burton ever discussed the debenture
offering with them . . .

12 *Paracor*, 79 F.3d at 891 (emphasis added), see also *Kaplan*, 49 F.3d at 1382-83 (“[a]lthough Rose’s
13 status as an officer and director may not per se establish that he controlled the other defendants, his
14 participation in the daily affairs of a relatively small company . . . suffices to establish a material
15 question of fact whether he was a controlling person) (emphasis added). The above cases demonstrate
16 that the Division cannot establish Respondents’ liability based merely upon their titles or their affiliation
17 with EVFL or Tokyo, and that the Division has the burden of proving that Respondents were involved in
18 the day-to-day operations of *FISC*, which is the entity that offered the investment program at issue.

19
20 **C. The Division failed to meet its burden of proving the controlling person allegations**
21 **regarding Mr. Zhang, Ms. Yuen, Mr. Cheng, Mr. Sharma, Mr. Wing, Mr. Suen and**
22 **Mr. Zhang.**

23 The controlling person caselaw, coupled with the lack of evidence presented by the Division,
24 establishes that the above individuals cannot be held responsible as controlling persons. As stated
25 above, with some minor exceptions, the Division sought to prove its allegations against Mr. Zhang,
26 Ms. Yuen, Mr. Cheng, Mr. Sharma, Mr. Wing, and Mr. Suen by introducing corporate records simply
27

1 stating that the above had a title or occupied some position with EVFL, Tokyo, EVG or FISC. The
2 Division offered no evidence that the above individuals played *any* role in the day-to-day operations of
3 FISC, hired or fired FISC's staff, created FISC's training program, instructed traders regarding how to
4 obtain clients, or had any knowledge of the statements made to investors. The following testimony *from*
5 *the Division's witnesses* establishes that the Division cannot meet its burden of proving controlling
6 person liability as to the above.⁷

7
8 **1. Testimony of Mr. Smedinghoff**

9 The testimony of the Division investigator Michael Smedinghoff conclusively established that
10 none of the individuals named above are liable as control persons. The following excerpts from
11 Mr. Smedinghoff's testimony demonstrate the Division's inability to support the controlling person
12 allegations.

13 Q. [MR. BASKIN] Now, can you tell us what specific evidence you're aware of that
14 Mr. Wing, Mr. Suen, Mr. Cheng, Mr. Sharma, Mr. Zhang and Ms. Yuen had any
15 involvement in selecting the office in Phoenix for FISC?
16

17 A. [MR. SMEDINGHOFF] Just the evidence that was presented here in the hearing.

18 Q. What evidence is that?

19 A. The evidence such as in choosing the office here?

20 Q. As in making the specific decision that this is going to be our office.

21 A. I don't believe there's any evidence that states that.

22 Q. ...With the exception of Mr. Wing and Mr. Tam, Mr. Cho and Mr. Simmons, can you tell
23 us the names of any of the other Respondents who were in Phoenix, Arizona for FISC
24 business?
25

26
27 ⁷ Division Exhibit S-74 establishes that Mr. Sharma resigned from EVFL and surrendered his EVFL shares on August 1, 1997.

- 1 A. I don't believe I have any evidence that proves that anybody else was in Phoenix, Arizona.
- 2 Q. Can you tell us what specific role Mr. Wing, Mr. Suen, Mr. Cheng, Mr. Sharma, Ms. Yuen
- 3 and Mr. Zhang had in formulating the policies and methods under which FISC Eastern
- 4 Vanguard or Tokyo International would operate?
- 5 A. Evidence concerning the policies?
- 6 Q. Yes.
- 7 A. I don't believe I can prove anything that they had anything to do with developing policies
- 8 for FISC.
- 9
- 10 Q. Are you aware of any evidence that Mr. Wing, Mr. Suen, Mr. Cheng, Mr. Sharma,
- 11 Ms. Yuen or Mr. Zhang were involved in interviewing or speaking with Mr. Dionisio
- 12 Meneses in connection with the decision to make him, I guess you would call him the
- 13 initial manager of FISC.
- 14 A. I don't have any direct evidence to that.
- 15 Q. Do you have any evidence that Mr. Wing, Mr. Suen, Mr. Cheng, Mr. Sharma, Mr. Zhang or
- 16 Ms. Yuen interviewed or spoke with Michael Cho before he was hired to come to the
- 17 Phoenix office?
- 18
- 19 A. I have no evidence that I know of that they spoke with him.
- 20 Q. Are you aware of any specific evidence of Mr. Wing, Mr. Suen, Mr. Cheng, Mr. Sharma,
- 21 Mr. Zhang, or Ms. Yuen speaking with or interviewing Mr. Simmons before he was hired
- 22 as a trader?
- 23 A. I don't believe so.
- 24
- 25
- 26

27 Accordingly, Mr. Sharma cannot be held responsible, under any theory, for sales of investments in FISC after that date.

1 Q. Are you aware of any involvement by Mr. Wing, Mr. Suen, Mr. Cheng, Mr. Sharma,
2 Mr. Zhang, or Ms. Yuen in the decision to hire the dealers that were employed by FISC in
3 its Phoenix offices?

4 A. I don't believe we have any evidence to that.

5 Q. Are you aware of Mr. Wing, Mr. Suen, Mr. Cheng, Mr. Sharma, Mr. Zhang, or Ms. Yuen
6 having any involvement in structuring the training program that has been described in this
7 case wherein potential traders were trained at FISC?

8 A. I don't believe so.

9 Q. Are you aware of any evidence of Mr. Wing, Mr. Suen, Mr. Cheng, Mr. Sharma,
10 Mr. Zhang or Ms. Yuen being involved in preparing any of the training materials that have
11 been admitted as exhibits in this?
12

13 A. I have no knowledge of that.

14 Q. There are a series of brochures that have been admitted in evidence that state or purport to
15 state the names and titles of some of the Respondents. Are you familiar with those
16 documents?
17

18 A. That is correct.

19 Q. Can you tell the Hearing Officer who drafted those documents?

20 A. I assume the company did.

21 Q. ...That's not my question. Not what you assume. Can you tell us the name of the person?

22 A. Can I testify to who did it? No, I cannot.

23 Q. Can you tell us whether Mr. Wing, Mr. Suen, Mr. Cheng, Mr. Sharma, Mr. Zhang or
24 Ms. Yuen gave any instruction to Mr. Meneses, Mr. Cho or Mr. Tam regarding how
25 training should be conducted at FISC's office?
26
27

1 A. I cannot testify to that.

2 Q. Can you tell us of any evidence that Mr. Wing, Mr. Suen, Mr. Cheng, Mr. Sharma,
3 Mr. Zhang or Ms. Yuen told any of the traders, Mr. Meneses, Mr. Cho or Mr. Simmons,
4 how to go about soliciting clients?

5 A. I cannot testify to that.

6 Q. Can you tell us of any evidence that Mr. Wing, Mr. Suen, Mr. Cheng, Mr. Sharma,
7 Mr. Zhang or Ms. Yuen told Mr. Simmons or Mr. Cho to make any of the statements that
8 have been attributed to them at this hearing by any of the State's witnesses?
9

10 A. I don't believe I can testify to that.

11 Q. Can you tell us whether Mr. Wing, Mr. Suen, Mr. Cheng, Mr. Sharma, Mr. Zhang or
12 Ms. Yuen had any knowledge that Mr. Simmons or Mr. Cheng made the statements that
13 have been attributed to them at the hearing?

14 A. I can't testify to that.

15 Q. Can you give us any evidence that Mr. Wing, Mr. Suen, Mr. Cheng, Mr. Sharma,
16 Mr. Zhang or Ms. Yuen had specific knowledge of any of the investment transactions that
17 have been the subject of the witnesses' testimony in this hearing?
18

19 A. I cannot testify to that.

20 Q. Can you tell us of any evidence of Mr. Wing, Mr. Suen, Mr. Cheng, Mr. Sharma,
21 Mr. Zhang or Ms. Yuen giving any direction to Mr. Simmons or Mr. Cho?

22 A. I cannot testify to that.

23 Q. Can you tell us of any evidence that Mr. Wing, Mr. Suen, Mr. Sharma, or Mr. Zhang, just
24 those four gentlemen, told Mr. Tam to do anything on behalf of FISC or Eastern Vanguard
25 or Tokyo International?
26
27

1 A. I can't testify to what they told, talked about.

2 (R.T. 9-28-98; at 2111-16.)

3 The above is overwhelming and undisputed evidence that Mr. Zhang, Ms. Yuen, Mr. Wing,
4 Mr. Suen, Mr. Cheng, Mr. Sharma had no involvement in the day-to-day affairs or management of
5 FISC. They did not select the location of FISC's offices; they did not set up the office; they were not at
6 the office for the day-to-day business; they did not participate in hiring or firing employees; they did not
7 participate in or direct the training; they did not give directions to any of FISC's employees; they did not
8 talk to any of FISC's clients. *There is no evidence that Mr. Suen, Mr. Cheng, Mr. Sharma, Mr. Zhang*
9 *and Ms. Yuen were ever in Arizona, let alone at FISC's offices.* These individuals cannot be liable for
10 Mr. Simmons' conduct under any standard.

11
12 **2. Testimony of Mr. Cho**

13 The above arguments are further supported by the testimony of Michael Cho during his marathon
14 four day cross-examination by the Division. The entirety of Mr. Cho's testimony regarding the alleged
15 control group was limited to the following:

16 1. A "local businessman" owned Tokyo. (R.T. 10/14/98, at 2721.)

17 2. Mr. Wing was the Chairman of EVFL, and Mr. Tam told Mr. Cho that Mr. Wing was the
18 "big boss." (R.T. 10/14/98, at 2722-23; R.T. 10/15/98, at 2815.)

19 3. Mr. Wing and Mr. Suen visited the Tokyo offices in San Francisco (R.T. 10/14/98, at
20 2723.)

21 4. Either Mr. Wing or Mr. Suen visited, on one occasion, FISC's offices, but Mr. Cho had no
22 meaningful interaction with them. (R.T. 10/14/98, at 2724-25.)
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1 5. Later in his testimony Mr. Cho recalled that it was Mr. Wing, not Mr. Suen, who visited
2 Phoenix. (R.T. 10/15/98, at 2809-11, 2814.-15) Mr. Cho and Mr. Wing had nothing more than "a
3 casual conversation" about FISC. (*Id.* at 2810.)

4 **3. Testimony of Joseph Saxon**

5 Division witness Joseph Saxon worked as a trader in the Tokyo offices in 1995-96 and then
6 opened an account with FISC in 1997. If anyone would be expected to have knowledge of Tokyo and/or
7 FISC's principals, it was Mr. Saxon. His testimony, however, was silent regarding the involvement of
8 Mr. Tam, Mr. Wing, Mr. Suen, Mr. Cheng, Mr. Sharma, Mr. Zhang and Ms. Yuen in the day-to-day
9 affairs or management of Tokyo or FISC. (R.T. 9/11/98, at 1300-99; 9/17/98, at 1804-1910.)

10 **4. Testimony of Willis Scott and William Nagorny**

11 Division witness Willis Scott was a trader at FISC for over four and one-half months. During that
12 time frame he never met or heard of Mr. Wing, Mr. Suen, Mr. Cheng, Mr. Sharma, Mr. Zhang or
13 Ms. Yuen. (R.T. 8/28/98, at 295-96.) Mr. Scott was unable to provide any testimony regarding whether
14 the above had any involvement with FISC. (*Id.* at 296.)

15 Division witness William Nagorny also worked as a trader at FISC from August through
16 December 1997. Like Mr. Scott, Mr. Nagorny also never met or heard of Mr. Wing, Mr. Suen,
17 Mr. Cheng, Mr. Sharma, Mr. Zhang or Ms. Yuen. (R.T. 9/1/98, at 641-42.) He had "no idea" who they
18 were. (*Id.* at 642.)

19 **5. Testimony of Mary Goss**

20 Mary Goss was employed at FISC from approximately March 1996 until August or September
21 1996. Although she had heard Mr. Wing's name, her testimony on cross-examination established that
22 none of the Respondents from Hong Kong can be classified as controlling persons:
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1 Q. [MR. BASKIN] Now, some questions about the visitors to the company. The only name
2 that you recognized was Sammy, right?

3 A. [MS. GOSS] Right.

4 Q. And basically some people came into town a couple of times while you were working
5 there; is that correct?

6 A. Correct.

7 Q. And you can't tell us about meetings that you attended where you were directed to do
8 certain things by these gentlemen, can you?

9 A. No.

10 Q. And you can't tell us what the specific --well, first, you can only tell us that you recognized
11 one person's name; right?

12 A. Right.

13 Q. So you can't tell us the names of any of these other people; correct?

14 A. Correct.

15 Q. And you can't tell us that this is the guy who sat down and said we need to open up the
16 Phoenix office; correct?

17 A. No. I had nothing to do with anything about that.

18 Q. And you can't tell us that these are the people that picked the building where the company
19 would be housed; correct?

20 A. Correct.

21 Q. And you can't tell us that these are the people that came up with the customer agreements
22 that would be signed; correct?

23 A. Right.

1 Q. You can't tell us that these would be the people that would say we're going to have training
2 and this is how we're going to have training; correct?

3 A. Right.

4 Q. And you can't tell us whether these people were actually people that were signing any
5 checks that might have come in to FISC; is that correct?

6 A. I'm sorry. Could you repeat. I kind of lost track of what your main question was.

7 Q. That Sammy and these other – [un] known person[s], you can't tell us whether they were
8 actually providing, they personally were providing or had specific responsibilities for
9 providing money to FISC.
10

11 A. Right. I had no direct relationship with any of them, of the corporate involvement with the
12 company. I had a job to do, just basically an accounting clerk, so I wasn't aware of the
13 larger scale details.
14

(R.T. 9-16-98, 1751-54.)

15 If none of the Division's witnesses can explain to the hearing officer the involvement of the above
16 individuals in the operations of FISC, the Commission has no basis to determine that they are
17 controlling persons. The Division failed to present sufficient evidence to meet its burden of proving its
18 allegation that some of the Respondents were controlling persons. The Commission must dismiss all
19 controlling person allegations against the above.
20

21 **D. The Division failed to meet its burden of proving the controlling person allegations**
22 **regarding Mr. Tam.**

23 The evidence presented at the hearing also failed to establish that Mr. Tam was a controlling
24 person of FISC. Although he had some involvement with FISC, it was not the involvement in "the
25 day-to-day affairs of the corporation" of the corporation required to establish controlling person liability.
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1 *Paracor Finance*, 79 F.3d at 890. For example, the Division failed to present any evidence of the
2 following:

- 3 1. that Mr. Tam was an officer, director or shareholder of any of the entities named in the
4 Notice;
- 5 2. that Mr. Tam was at FISC's offices on a daily or even regular basis;
- 6 3. that Mr. Tam put together FISC's training program;
- 7 4. that Mr. Tam provided instruction during the training program;
- 8 5. that Mr. Tam provided any direction to traders regarding how to manage customer
9 accounts;
- 10 6. that Mr. Tam directed traders regarding how to solicit clients;
- 11 7. that Mr. Tam solicited potential investors; or
- 12 8. that Mr. Tam talked to any FISC investor prior to their investment.

13 The Division's witnesses once again helped establish that Mr. Tam was not a controlling person.
14 Division witness Willis Scott, who spent four and one-half months at FISC, had the following extremely
15 vague knowledge of Mr. Tam: "[he was] referred to as a couple of times as far as being a person over
16 Mr.-over Mr. Cho, but that's pretty much all I know. (R.T. 8/28/98, at 247.) According to Mr. Nagorny,
17 Mr. Tam "showed up [at FISC] once a month for about an hour or so to do paperwork and leave." (R.T.
18 9/1/98, at 560.) Mr. Nagorny was not even introduced to Mr. Tam until the day FISC's office closed.
19 (Id.)

20 Mr. Tam's complete lack of involvement in soliciting FISC investors, coupled with his
21 exceedingly limited involvement in the day to day business of FISC, proves that he was not a controlling
22 person of FISC. All allegations against him must be dismissed.
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1 playing a part in the investment at issue here, which related to FISC. There was no evidence to that
2 effect, and all allegations against EVG must be summarily dismissed.

3 **G. The Commission should deny the Division's Motion for an Evidentiary Inference**
4 **Against Certain Respondents.**

5 The Division filed a motion seeking negative inferences against Respondents Sharma, EVGL,
6 Wing and Suen as a result of their alleged failure to provide records of their compensation, *at any time*,
7 from EVFL. The Division apparently believes that this information will help establish that the above
8 Respondents controlled EVFL.

9 As the hearing officer is aware, there were numerous conferences regarding the Division's
10 subpoenas for records related to EVFL. The last hearing, which was on November 4, 1998, was not
11 intended to be the last hearing. At the beginning of the hearing, the parties discussed the prospect of the
12 Division taking Mr. Yam's deposition. The hearing officer ordered the Division, "either in lieu of the
13 affidavit or after review of the affidavit to supplement the determination whether they want to depose
14 Mr. Yam, to submit written interrogatories to Mr. Yam specifically designed to at least determine the
15 fields of his knowledge." (R.T. 11/4/98, at 17.)
16

17 The parties then began discussing the documents the Division alleged needed to be produced. At
18 the end of the hearing, Respondents' counsel indicated that he needed to speak with Respondents
19 regarding some of the information sought by the Division. (R.T. 11/4/98, at 30, 31.) Counsel indicated
20 that he was going to report the results back to the hearing officer. After talking with the Respondents,
21 counsel was able to procure the affidavit that has been admitted in evidence as Exhibit S-184. Upon
22 reflection after the hearing and careful consideration of the controlling person caselaw, Counsel believed
23 that this affidavit, which stated that any benefit the relevant Respondents received from EVFL came
24 from sources other than FISC, was sufficient to satisfy the Division. Respondents provided the affidavit
25 to the Division in early December 1998. Counsel fully expected, based on the previous pattern of
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1 informally discussing this issue and then seeking guidance from the hearing officer, that the Division
2 would let counsel know if it believed the affidavit was inadequate. As time passed, counsel became
3 convinced that the Division was satisfied with the affidavit the information it sought. *Three months*
4 *later* and with no advance notice, the Division filed its Motion. Counsel was deprived of the
5 opportunity to explain the rationale behind the affidavit and asks that another conference be set before
6 the hearing officer rules on the motion, or that the Commission deny it as untimely.

7 Further, as has been mentioned in other portions of this brief, the information sought is not
8 relevant, because it is the operation of *EVFL solely as it pertains to FISC* that is relevant to this
9 proceeding. Mr. Yam's affidavit specifically stated that none of the Respondents received any benefit
10 from EVFL as it pertained to FISC. Accordingly, evidence of compensation related to other operations
11 of EVFL cannot establish control of FISC and is irrelevant.

12 This argument is supported by the caselaw discussing the liability of controlling persons in
13 connection with the particular investment program at issue, as opposed to the general activities of the
14 entity offering the investment program. *Paracor Finance*, 793 F.3d at 891 (although CEO was involved
15 in the management of the corporation, he was not a controlling person because there was no evidence he
16 exercised direct or indirect control over the corporation's debenture offering.) In other words, the
17 alleged EVFL "control group" can only be liable upon a showing of control over FISC. The records
18 sought by the Division cannot lead to that conclusion. As such, if the Commission grants the Motion,
19 any "inference" should simply be that the relevant Respondents received a benefit from operations of
20 EVFL *other than operations related to FISC*, which is of no moment here.

21 ...

22 ...

23 ...

1 **H. Assuming arguendo that the Division has established that the “control group**
2 **members” are controlling persons, the allegations against them must be dismissed**
3 **because the alleged “control group” acted in good faith and did not directly or**
4 **indirectly induce the conduct at issue.**

5 Assuming arguendo that the Division has established that the “control group” are controlling
6 persons, the allegations against them must be dismissed because the alleged “control group” acted in
7 good faith and did not directly or indirectly induce the conduct at issue. A controlling person is not
8 liable for any violations of the Arizona Securities Act if they “acted in good faith and did not directly or
9 indirectly induce the act underlying the action.” A.R.S. § 44-1999. The ninth circuit has noted that
10 evidence establishing that an individual is not a controlling person may also serve as evidence that the
11 same individual acted in good faith. *Paracor Finance*, 79 F.3d at 891 (“the same facts that show
12 Burton’s control over Casablanca was less than absolute are sufficient to prove his good faith defense as
13 a matter of law. Burton knew that there was a debenture offering, *but the Investors have not introduced*
14 *evidence that he was involved in its workings in any significant way.* Thus, Burton did not ‘directly or
15 indirectly induce the act or acts constituting the violation or cause of action.’”) *See also Kaplan v. Rose*,
16 49 F.3d at 1383 (evidence that controlling person did not direct anyone to make false or misleading
17 statements sufficient to establish good faith.)

18 As in *Paracor Finance*, there is no evidence that *any* of the alleged control group were involved in
19 any significant way with the day-to-day operations of FISC. Likewise, there is no evidence that any of
20 the alleged control group directed *anyone* to make false and misleading statements. Rather, FISC
21 created a training program specifically designed to ensure that investors received full disclosure. The
22 evidence set forth above establishes conclusively that the alleged “control group” acted in good faith and
23 did not directly or indirectly induce any of the violations. There is no evidence to the contrary and all
24 controlling person allegations must be dismissed.
25
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1 **V. The Division has failed to establish any violations by the Respondents of the anti-fraud**
2 **provisions of A.R.S. § 44-1991.**

3 A.R.S. § 44-1991 is the antifraud provision of the Act.⁸ Respondents anticipate that the gravamen
4 of the Division's fraud allegations will be that Respondents violated A.R.S. § 44-1991(2), which
5 provides that is unlawful to:

6 Make any untrue statement of material fact, or omit to state any material fact
7 necessary in order to make the statements made, in light of the circumstances
8 under which they were made, not misleading...

9 The standard of materiality of misrepresented or omitted facts under A.R.S. § 44-1991(2) is
10 objective. *Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733 P.2d 1131 (Ct. App. 1986).
11 The standard of materiality also contemplates a "showing of a substantial likelihood that, under the
12 circumstances, the omitted fact would have assumed actual significance in the deliberations of the
13 reasonable [buyer]." *Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 887, 892 (App. 1981) (quoting
14 *T.S.C. Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). A misrepresented or omitted fact is
15 material only if a reasonable investor would have viewed the misrepresentation or omission as "having
16 significantly altered the total mix of information made available." *Basic, Inc. v. Levinson*, 45 U.S. 224,
17 231-32 (1988). Respondents do not commit securities fraud merely by failing to disclose all non-public
18 material information in their possession. *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 25 (1st Cir.
19 1987) (citing *Chiarella v. United States*, 445 U.S. 222, 235 (1980)). Only those facts, if any, must be
20 disclosed that are needed so that what was revealed would not be "so incomplete as to mislead."
21 *Backman v. Polaroid Corp.*, 910 F.2d 10, 16 (1st Cir. 1990) (quoting *SEC v. Texas Gulf Sulfur Co.*, 401
22 F.2d 833, 862 (2d Cir. 1968) (en banc) *cert denied*, 394 U.S. 976 (1969)).

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27 ⁸ Again, Respondents' position is that of the United States Supreme Court. The Commission has no jurisdiction over this
matter.

1 Finally, Arizona law now requires that to prove a violation of A.R.S. § 44-1991 the Division must
2 show that: 1) Respondents had more than a collateral role in the transaction; and 2) any alleged
3 misstatements made by Respondents go beyond “merely [having] the effect of influencing a buyer” to
4 purchase the security. *Standard Chartered*, 190 Ariz. at 22, 945 P.2d at 333.

5 Before discussing the Division’s fraud allegations, Respondents note that the above sections
6 established that the Respondents have no primary or controlling person liability for the offer or sale of
7 investments in FISC and render this section superfluous. Because the Division cannot establish any
8 primary or controlling person liability as to Respondents, the Commission need not reach this issue.
9 This section is thus written to briefly address the nucleus of the fraud allegations made by the Division
10 at the hearing. Respondents will address any additional issues raised by the Division in their response to
11 the Division’s brief.
12

13 Respondents also remind the Commission that any order related to potential violations of the
14 anti-fraud provisions of the Act must be based upon the evidence from the hearing. If anything, the
15 factors discussed above are more obvious here because the Division cannot link Respondents to any of
16 the alleged misrepresentations or material omissions. For example, the Division presented no evidence
17 of any statements Mr. Zhang, Mr. Suen, Mr. Sharma, Mr. Cheng, Mr. Wing, Mr. Tam, Ms. Yuen or
18 Mr. Cho made to members calculated to induce them to invest. Likewise, the Division presented no
19 evidence that these individuals, directly or indirectly, contributed to any of the alleged
20 misrepresentations or omissions by directing anyone to make those statements.
21

22 Accordingly, Respondents remind the Commission that the core group of alleged
23 misrepresentations revolve around one individual, Mr. Simmons. It was only Mr. Simmons who
24 falsified his credentials; it was only Mr. Simmons who stated that EVFL was affiliated with the
25 Vanguard Group of mutual funds; it was only Mr. Simmons who misrepresented his family’s and his
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1 own investments in FISC; it was only Mr. Simmons who guaranteed a specific return to investors; it was
2 only Mr. Simmons who told investors they would double their money; it was only Mr. Simmons who
3 promised investors that seven out of ten trades would be profitable; it was only Mr. Simmons who
4 minimized the risk involved in foreign currency trading; it was only Mr. Simmons who promised to
5 limit investors' losses to \$300 a trade; *and it was only Mr. Simmons who admitted to making some of*
6 *these statements when the Division took his EUO.*

7
8 None of the other Respondents should be responsible for the conduct of a rogue broker such as
9 Mr. Simmons. The earlier discussion of FISC's training program, FISC's disclosure documents and
10 Mr. Cho's efforts to ensure that FISC's traders did not make any misrepresentations demonstrate FISC's
11 commitment to provide accurate information to its investors. Further, none of the other Respondents
12 made the misrepresentations attributed to Mr. Simmons, instructed him to make the above
13 misrepresentations, or knew that he was making them to induce individuals to invest. Accordingly, any
14 violations of the anti-fraud provisions of the Securities Act belong to Mr. Simmons, and no other
15 Respondent.

16
17 **A. The Commission should reject Alan Davis' false allegations regarding Mr. Cho.**

18 Alan Davis falsely alleged that Mr. Cho told him that the Davis' account would earn 3-5% per
19 month and would double within two years, and that Mr. Cho later made similar representations to the
20 elder Davises when they opened their account with Mr. Simmons. (R.T. 8/27/98, at 139; R.T. 9/9/98, at
21 748, 943.) *Mr. Davis was the only witness at the hearing to attribute such a statement to Mr. Cho. Even*
22 *Mr. Davis' mother contradicted this testimony.* Melba Davis specifically testified that when the Davises
23 first met Mr. Cho, he "just introduced himself and said glad to have you with our company, thanked us
24 for investing." (R.T. 9/10/98, at 978; *see id.* at 1019-20.) Alan Davis' lack of credibility is also
25 corroborated by the testimony of Ruth Shumway and Michael Noriega, neither of whom attributed the
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1 above misrepresentation to Mr. Cho. Mr. Davis' testimony is also contradicted by Mr. Nagorny's and
2 Mr. Scott's testimony that Mr. Cho told them not to make any promises or guarantees to potential
3 investors. Further, Mr. Davis' testimony is even contradicted by the most biased witness of all,
4 Mr. Saxon, who stated that Mr. Cho never promised him a specific return on his investment. (R.T.
5 10/8/98, at 2276-77.) Finally, as discussed earlier, the Commission should remember that Mr. Davis
6 reinvented his testimony in mid-stream, thus rendering all of his statements inherently unreliable. (R.T.
7 9/9/98, at 865.) The Commission should not allow Mr. Davis' false testimony to form the basis of a
8 fraud finding against Mr. Cho.
9

10 **VI. The Division has failed to establish any basis for an order of restitution or rescission.**

11 The above arguments demonstrate that the Respondents have not violated the Securities Act and
12 should, therefore, not be ordered to pay any restitution or administrative penalties. If, however, the
13 Commission disagrees with Respondents and determines that some Respondents have violated the
14 Securities Act, the Commission should use its discretion and not order Respondents to pay any
15 restitution or administrative penalties.
16

17 A.R.S. §44-2032(1) provides that the Commission *may* order restitution if it determines that an
18 individual has violated the Securities Act. Likewise, A.R.S. §44-2036 provides that the Commission
19 *may* assess administrative penalties for violations of the Securities Act. A case such as the present one
20 requires a thoughtful exercise of the Commission's discretion and the separate consideration of *each*
21 Respondent's role, or lack of a role in the investment program at issue.
22

23 The Division seeks to paint all of the Respondents with the same broad brush strokes. The
24 Commission must reject this approach and recognize that the Division has overreached. This case was
25 brought because of Mr. Simmons' folly. He intentionally disregarded and abused the safeguards in
26 place at FISC, and he also ignored the clear message of FISC's training program. The Division was
27

1 unable to prove conduct by any other Respondent that remotely approached that of Mr. Simmons, and
2 was unable to prove that the vast majority of Respondents were ever in Phoenix or talked to any
3 investors, let alone were responsible for controlling the corporate entities at issue. Accordingly, any
4 order must take into account the glaring differences between Mr. Simmons and the other Respondents,
5 along with the questionable credibility of witnesses such as Mr. Saxon and Alan Davis. This case does
6 not involve an international conspiracy, and any order should so reflect.

7
8 Finally, the Commission should not order restitution to individuals who traded their own accounts
9 or who traded on behalf of their families, such as Mr. Scott and Mr. Nagorny. These individuals
10 attended FISC's training programs; they were fully advised of the risks in foreign currency trading; they
11 were not pressured to open their own accounts; and they made all investment decisions in their accounts.
12 In addition to Mr. Scott and Mr. Nagorny, the following individuals traded their own accounts:
13 Mr. Benson, Mr. Becker, Mr. Lares, Mr. Fox and Mr. Unlucomert. (Ex. S-138.)

14
15 Further, it is undisputed that William Nagorny sold an investment in FISC to Julius Nagorny, yet
16 William Nagorny was not named as a Respondent. Although it is unfortunate that these individuals lost
17 money, Respondents should not be held responsible, particularly when the Division has chosen to not
18 seek to hold individuals such as William Nagorny responsible for a primary violation of the Securities
19 Act. At a minimum, the Commission should not order any restitution to any individuals who traded
20 their own accounts or who traded on behalf of their families.

21 **VII. Conclusion.**

22
23 Mr. Simmons is the only Respondent who should be subject to a Commission Order. The
24 remaining Respondents are neither primarily nor secondarily liable for any violations of the Securities
25 Act. The allegations against all Respondents with the exception of Mr. Simmons must be dismissed.
26
27

1 DATED this 26th day of April, 1999.

2 ROSHKA HEYMAN & DEWULF, PLC

3
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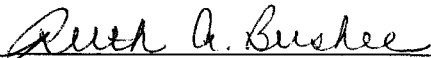
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